REPLY BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

15-3398

JOHN H. GREENE

Appellant

v.

ROBERT A. MCDONALD
SECRETARY OF VETERANS AFFAIRS,

Appellee.

CHISHOLM CHISHOLM & KILPATRICK
ANGELA BUNNELL
One Turks Head Place, Suite 1100
Providence, Rhode Island 02903
(401) 331-6300
(401) 421-3185 Facsimile
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Regulations

Record Before the Agency ("R") Citations

APPELANT'S REPLY ARGUMENT

I. The Board erred when it failed to properly interpret and apply the law, disregarded favorable findings, and relied on inadequate examinations in order to rate the Veteran's low back disability.

The Secretary suggests that the "Board's decision is based on a plausible basis in the record, the examinations it relied on are adequate, and it provided an adequate statement of reasons or bases in support of its determination that Appellant was not entitled to a rating in excess of 20 percent for his lumbar spine disability." Sec. Br. at 9. However, the Secretary's arguments fail to demonstrate that the Board properly interpreted the results from a favorable July 2010 VA examination, complied with its duty to assist the Veteran in the development of his claim, or complied with a prior remand order. The Secretary's arguments are unpersuasive.

Mr. Greene argues that he was entitled to a rating in excess of 20 percent based on the favorable findings in the July 2010 VA examination which indicated that he had pain on motion during forward flexion beginning at 20 degrees. Apa. Op. at 7-9; R-1023-24. The examiner opined that this pain was the most significant factor in his limitation of range of motion. R-1023-24. The Secretary suggests that this argument "ignores the fact that painful motion does not automatically equate to limited motion under the rating schedule" and "pain is contemplated by the General Rating Formula for Diseases and Injuries of the Spine and its corresponding regulations." Sec. Br. at 10. The Secretary's arguments are contrary to law. First, the Court has explicitly "rejected the Secretary's argument that DCs based upon limitation of range of motion

already 'contemplate the functional loss resulting from pain on undertaking motion[.]'" *Mitchell v. Shinseki*, 25 Vet.App. 32, 37 (2011) (citing *DeLuca v. Brown*, 8 Vet.App. 202, 205-06 (1995)). The Secretary is essentially making the same argument that was previously rejected by the Court in *Mitchell* and therefore his argument that the rating criteria already contemplate pain should be dismissed.

Second, the Secretary misconstrues the Appellant's argument. He did not argue that his pain automatically warranted a higher rating. *See* Apa. Op. at 7-9. He argued that his functional loss due to pain gave rise to entitlement to a higher rating. *Mitchell*, 25 Vet.App. at 37-38. The Secretary relies on the recent holding in *Thompson v. McDonald*, 815 F.3d 781, 785 (2016), to support his argument that his actual limitation of motion was within the criteria for a 20 percent rating. Sec. Br. at 11. He notes that, per *Thompson*, the ultimate assigned rating is to be understood and completed in terms of the criteria and range of motion thresholds found in 38 C.F.R. 4.71a. *Id.*

The Secretary ignores that the Court in *Thompson* found "it is clear that the guidance of § 4.40 is intended to be used in understanding the nature of a veteran's disability, after which a rating is determined based on the § 4.71a criteria." *Thompson*, 815 F.3d at 785. While sections 4.40 and 4.45 specifically contemplate pain on motion, these regulations are not "automatically" incorporated into section 4.71a or contemplated by his current assigned rating as the Secretary suggests. Sec. Br. at 10. Instead, the examiners were required to provide sufficient information regarding

functional loss and whether that functional loss limits functional ability to the extent a veteran would qualify for entitlement to a higher rating under 38 C.F.R. 4.71a. The Board is then tasked with interpreting this information and assigning the rating based on the § 4.71a criteria. Here, the Veteran's functional ability is significantly limited by pain and the examiner indicated that this functional loss has limited his motion to 20 degrees. R-1023-24. Thus, his range of motion approximated a 40 percent rating under 38 C.F.R. 4.71a.

The Secretary next suggests that "when read together, the March 2013, July 2014, and January 2015 VA examinations are adequate." Sec. Br. at 12. He concedes that the July 2014 VA examination did not comply with the prior remand instructions but argues the January 2015 examination cured this error. Sec. Br. at 13. This argument is without merit because this examination is also inadequate. *See* R-91-102. The examination report did indicate that there was no functional loss exhibited on repetitive motion, but the Secretary fails to mention that the Veteran was not examined after repetitive motion. R-93; *DeLuca*, 8 Vet.App. 202, 206 (1995) (finding an examination inadequate where the examiner did not consider functional loss on use or due to flares). The report is insufficient because the examiner did not base her conclusion on a personal examination of the Veteran or provide any explanation as to how she reached this conclusion without conducting testing. *See* R-93; *Guerrieri v. Brown*, 4 Vet.App. 467, 470-71 (1993).

The examiner's notation regarding a lack of functional loss is also inconsistent with other evidence of record, as the January 2015 VA examiner indicated that there was pain on motion during all range of motion testing. *See Petitti v. McDonald*, 27 Vet.App. 415, 425 (2015) (equating an "actually painful" joint with painful motion of the afflicted joint); *Thompson*, 815 F.3d at 785; R-93. The Secretary asserts that any inconsistent information provided in the examination is harmless because the examination as a whole is clear and provides a sufficient basis for the Board to weigh in reaching its decision. Sec. Br. at 13-14. Given the lack of information provided in the January 2015 examination and its inconsistencies, this suggestion is unsupported.

The Secretary also notes that the January 2015 VA examination "cures any defect in the March 2012 and July 2014 VA examinations." Sec. Br. at 14. Since the January 2015 examination is also inadequate as discussed *supra*, this is not supported. Further, this argument does not address any of the specific deficiencies in the examinations as argued by the Appellant. *See* Apa. Op. Br 9-11; Sec. Br. at 11-15.

To the extent the Secretary suggests that the Board's finding was plausible and should not be disturbed unless clearly erroneous this notion is misguided. Sec. Br. at 7-8. The scope of the duty to assist should be treated as a question of law. *Beasley v. Shinseki,* 709 F.3d 1154, 1157 (Fed. Cir. 2013). VA's duty to assist a veteran requires the VA to obtain an examination that is adequate for adjudication purposes. *See*, *e.g.*, 38 C.F.R. § 4.2 (2016) ("[I]t is incumbent upon the rating board to return [a] report as inadequate for evaluation purposes [if it does not contain sufficient detail]"); *see*

Bowling v. Principi, 15 Vet.App. 1, 12 (2001). The March 2013, July 2014, and January 2015 medical examinations were legally deficient and thus should be reviewed *de novo*. Apa. Op. Br. 7-15. Moreover, even assuming *arguendo* the clearly erroneous standard of review that the Secretary suggests applies, the Board's reliance on the medical examinations of record is clearly erroneous. A factual finding as to the adequacy of a VA medical examination will be found clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *El-Amin v. Shinseki*, 26 Vet.App. 136, 136 (2013). This is the case here. VA did not properly assist Mr. Greene in the development of his claim since the examinations provided in March 2013, July 2014, and January 2015 are inadequate. As such, remand is required.

II. The Board misinterpreted 38 C.F.R. § 3.321 (2016) when it failed to properly account for the Veteran's symptomatology.

The Secretary argues that the Board did not err in failing to specifically consider whether his 20 percent rating adequately compensates him for the use of medications, cane, fabric corset, TENS unit and antalgic posture because the rating criteria contemplated this symptomatology. Sec. Br. at 15. He alleges that the Veteran failed to explain how such symptoms are "so unusual or exceptional in nature such that referral for an extraschedular rating was required." *Id.* at 16. The Secretary attempts to shift the burden to the Veteran without explaining why the Board was absolved of its requirement to discuss the Veteran's symptomatology in the first place. *See Johnson*

v. McDonald, 762 F.3d 1362, 1366 (Fed. Cir. 2014). As such, this argument is unpersuasive.

When considering the need for referral for extraschedular consideration, the Board is required to consider not just the Veteran's symptoms, but also the severity of those symptoms. *See Thun v. Peake*, 22 Vet.App. 111, 115 (2008). The rating criteria, which only contemplates limitation of motion, does not contemplate Mr. Greene's need for a cane, antalgic posture, and the need to for heavy narcotics due to pain. Apa. Op. Br. at 12-14. Moreover, VA's own policy suggests that the impact of medication on concentration may require referral for extraschedular consideration. VA Gen. Coun. Prec. 06-96 (Aug. 16, 1996). The Board made no attempt to address this policy, the Veteran's symptoms, or their severity.

The Secretary did not address the Appellant's argument that just because the rating criteria contemplate severe and pronounced symptomatology in higher ratings does not mean that the Veteran's assigned rating specifically contemplated his disability picture. Apa. Op. Br. at 14-15; *see also Yancy v. McDonald*, 27 Vet.App. 484, 496. It can be presumed the Secretary concedes this argument. *See MacWhorter v. Derwinski*, 2 Vet.App. 133, 136 (1992) (Court noting that where the Secretary fails to respond appropriately, "the Court deems itself free to assume, and does conclude, the points raised by appellant, and ignored by the General Counsel, to be conceded").

The Board's failure to consider the second element of *Thun* compounded its error. *See also Yancy*, 27 Vet.App. at 496 (where the Court found error in the Board's

analysis regarding the first *Thun* element, the Court held that "because the Board did not reach the second *Thun* element, the Court cannot hold that the Board's error was harmless"). Had the Board conducted the proper analysis of the first step, it may have determined that the second step was necessary. The Secretary's argument entirely fails to address the Board's misinterpretation of the law when it determined that "he is able to work full time" as proof that his disability did not exhibit marked interference with employment. The record demonstrates that due to his back pain and medication to manage this, he was placed on a personal improvement program at work. R-916. In addition, a VA examiner opined that his condition would affect his employment by causing increased absenteeism and more difficulty performing his duties. R-1026. Had the Board not applied a higher standard than the one found in the law, it may have found that his disability produced marked interference with employment satisfying the second element of *Thun*. *See Massey v. Brown*, 7 Vet.App. 204, 208 (1994) (finding the Board erred when denying an increased rating based on a higher standard than that found in the relevant diagnostic code). As such, the Board's misinterpretation of 38 C.F.R. § 3.321(b)(1) prejudiced the Veteran, and remand is required for the proper adjudication of his claim.

CONCLUSION

Mr. Greene was entitled to compensation in excess of 20 percent for his low back disability based on his limitation of forward flexion of the thoracolumbar spine to 30 degrees or less. The Board was also required to consider all of his symptoms in

determining whether a referral for extraschedular consideration was warranted. Because the Board failed to properly interpret the results of the July 2010 VA examination and failed to properly consider whether Mr. Greene's assigned schedular rating adequately compensated his entire disability picture, the Board erred.

Based on the foregoing reasons, as well as the arguments contained in Mr. Greene's opening brief, the Court should vacate the Board's decision and remand the appeal with instructions for the Board to readjudicate the issue of entitlement to an increased rating for his low back condition and extraschedular referral, as well as provide adequate reasons or bases for its decision, in accordance with the Court's opinion.

Respectfully Submitted,

John H. Greene
By His Representatives,

/s/ Angela Bunnell
Angela Bunnell
Chisholm, Chisholm & Kilpatrick
One Turks Head Place, Suite 1100
Providence, RI 02903
(401) 331-6300
(401) 421-3185 Facsimile